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THE BURGER COURT (1969-1986)*

Russell W. Galloway, Jr.**

I. INTRODUCTION

This article discusses the United States Supreme Court during Warren E. Burger's tenure as Chief Justice of the United States. The personnel changes that caused the shift from the liberal activism of the Warren era to the conservatism of the Burger era will be described. The resulting voting profiles and bloc alignments will be outlined. And the leading cases of each succeeding term will be discussed briefly.

The United States Supreme Court had the most liberal-activist panel of Justices in its entire history in early 1969.¹ At that time, the Court was dominated by the "third liberal-activist five," Douglas, Warren, Brennan, Fortas, and Marshall.² Black, the former leader of the liberal wing, was still on the Court, but had moved into the Court's statistical center in the late 1960's. White and Stewart were two moderate conservatives. Harlan, the conservative conscience of the Warren Court, was the only real conservative on the Court. In short, the lineup was as follows:

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* Supreme Court History Project, Publication No. 10. Cf. Galloway, *The First Decade of the Burger Court: Conservative Dominance (1969-1979)*, 21 SANTA CLARA L. REV. 891 (1981) (Supreme Court History Project, Publication No. 4).

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1. See Galloway, *The Third Period of the Warren Court: Liberal Dominance (1962-1969)*, 20 SANTA CLARA L. REV. 773 (1980) (Supreme Court History Project, Publication No. 3) [hereinafter Galloway, *The Third Period of the Warren Court*].

2. The "first liberal-activist five," Black, Douglas, Warren, Brennan, and Goldberg, dominated the Court in the October 1962 through 1964 Terms. The "second liberal-activist five," Black, Douglas, Warren, Brennan, and Fortas, had its moment of glory in the October 1965 Term. The "third liberal-activist five" dominated the October 1967 and 1968 Terms.

TABLE 1

ALIGNMENT OF JUSTICES—OCTOBER 1968 TERM

LEFT	CENTER	RIGHT
Douglas	Black	Harlan
Fortas	White	
Warren	Stewart →	
Brennan		
Marshall		

The Warren Court pursued its liberal-activist course up to the summer of 1969, campaigning vigorously on behalf of racial minorities, criminal defendants, the press, urban voters, trustbusters, civil rights demonstrators, labor unions, conscientious objectors, and various victims of urban-industrial society, such as injured employees and the poor.

This "second liberal era" (1937-69) of the Supreme Court was ended abruptly in 1969, and the Court's "third conservative era" (1970-19____) began shortly thereafter.³ The following pages will trace the swing to the right from 1969 to 1972 and describe the unfolding conservative era of Supreme Court history that continues at the time of this writing. The analysis will suggest that the Burger Court has had four periods: (1) a transitional period (1969-72), in which the Court shifted from liberal to conservative dominance; (2) the heyday of the Nixon Court (1972-77), a period of conservative dominance; (3) a more moderate period (1977-82); and (4) a final period of conservative dominance (1982-86).

II. DISCUSSION

A. *The Supreme Court Swings to the Right (1969-1972)*

The transition from the liberalism of the Warren era to the conservatism of the Burger era took place with unusual speed. Traditionally, the Supreme Court lags behind the elective branches. The Court, representing the attitudes of the recent past, provides a longitudinal check and balance on Congress and the President, which in turn represent the present mood of the electorate. The national swing to the right that came to fruition in 1968, however, was trans-

3. See R. GALLOWAY, *THE RICH AND THE POOR IN SUPREME COURT HISTORY* (1982), which contends that Supreme Court history has had a first conservative era (1790-1835), a first liberal era (1836-90), a second conservative era (1890-1937), a second liberal era (1937-69), and a third conservative era (1969-present).

mitted to the Court with highly abnormal, almost shocking, suddenness.

The dramatic shift from liberalism to conservatism on the Court was the result of a failed effort by the liberals to pack the Court before the end of Lyndon Johnson's presidency.⁴ By 1968, the Democratic leadership had collapsed under its own mistakes in conducting the Vietnam War. The threat of a Nixon victory in the November election was apparent. Chief Justice Warren despised Nixon and correctly surmised that, given the chance, Nixon would destroy the Court as an activist instrument of social reform and justice.

In order to prevent Nixon from gaining the opportunity to name the next Chief Justice, Warren tendered his resignation to Johnson to take effect whenever Johnson named a successor. Warren assumed that Johnson, whose views on domestic policy were quite similar to those of the Court's liberal-activist majority, would appoint Abe Fortas and thus insure that Warren's brand of crusading liberalism would prevail for many more years. Johnson responded precisely as Warren expected, nominating Associate Justice Fortas to succeed Warren, with Homer Thornberry to take Fortas' seat. The Republican opposition, however, unearthed questionable financial dealings by Fortas, and Johnson consequently withdrew the Fortas nomination, and cancelled the Thornberry nomination as well. Under mounting pressure, Fortas resigned from the Court in May 1969.⁵

Meanwhile, Nixon had won the 1968 election and was inaugurated in January of 1969. Thus, Warren ultimately tendered his resignation to his arch-enemy, effective at the end of the October 1968 Term. Instead of a Court with a solid five-vote liberal majority made up of Fortas, Douglas, Brennan, Marshall, and Thornberry, Nixon inherited a Court with only three liberals and two vacant slots. Nixon, who had campaigned against the Court and pledged to pack it with conservatives, was handed the chance to remake the Court during the first year of his presidency. He responded by appointing the "Minnesota Twins," Warren E. Burger and Harry A. Blackmun. Thus, the Court's era of liberal activism came to an end.

The October 1969 Term, first of the Burger era, was a time of transition. Burger became Chief Justice and was present throughout

4. See H. SCHWARTZ, *SUPER CHIEF* 680-83, 720-22 (1983), for a more detailed account of these events.

5. See H. SCHWARTZ, *supra* note 4.

the Term, but Fortas' seat remained empty. The line-up was as follows:

TABLE 2

ALIGNMENT OF JUSTICES—OCTOBER 1969 TERM

LEFT	CENTER	RIGHT
Douglas	Black	Burger
Brennan	White	Harlan
Marshall	Stewart →	

Burger had by far the most conservative voting pattern on the Court, ousting Harlan from his accustomed spot as the most conservative Justice.⁶ Dissent rates on the left promptly leaped upward, while the dissent rates of Harlan and Stewart plunged.⁷ The shift to the right was under way.

The conservative dominance which became characteristic of the early Burger era, however, was not achieved during the October 1969 Term. Burger, the Court's most conservative Justice, had the highest dissent rate on the Court. The most famous cases of the Term were liberal victories. For example, *Alexander v. Holmes County Board of Education*⁸ insisted on school desegregation now; *Goldberg v. Kelly*⁹ required trial-type hearings prior to termination of welfare benefits; and *In re Winship*¹⁰ extended the "proof beyond a reasonable doubt" requirement to juvenile delinquency proceedings. These liberal landmarks suggest that Earl Warren's brand of liberal activism did not evaporate promptly upon his retirement.

Nevertheless, other landmark decisions of the October 1969 Term foretold the conservatism and judicial restraint that would soon become dominant. *Dandridge v. Williams*,¹¹ for example, upheld a maximum grant restriction on Aid to Families with Dependent Children benefits, sending the first clear signal that the Warren Court's activist approach to the equal protection clause would soon yield to a restrained, deferential approach, at least in welfare cases. *Evans v. Abney*¹² upheld the closing of Macon, Georgia's public

6. See Galloway, *The Third Period of the Warren Court*, *supra* note 1, at 813.

7. See Galloway, *The First Decade of the Burger Court: Conservative Dominance (1969-1979)*, 21 SANTA CLARA L. REV. 891, 895 (1981) [hereinafter Galloway, *The First Decade of the Burger Court*].

8. 396 U.S. 19 (1969) (8-0 decision).

9. 397 U.S. 254 (1970). Burger, Stewart and Black dissented.

10. 397 U.S. 358 (1970). Burger, Stewart and Black dissented.

11. 397 U.S. 471 (1970). Douglas, Brennan and Marshall dissented.

12. 396 U.S. 435 (1970). Douglas and Brennan dissented. Marshall did not participate.

swimming pools despite the obvious motive of avoiding desegregation. *Williams v. Florida*,¹³ to cite one more example, upheld six-person juries in criminal cases. The emerging conservative trend was clear.

The conservative dominance that has been the hallmark of the Burger era began in the October 1970 Term and remained in full force for at least six consecutive Terms. During this period, the Court's right wing substantially rewrote the law, moving the federal courts and, to some extent, the state courts from a posture of liberal activism to one of conservatism and restraint.

Voting data for the October 1970 Term, second of the Burger era, reflect the onset of conservative dominance. Burger's dissent rate went from the *highest* on the Court to the *lowest*. In contrast, dissent rates on the left rose dramatically. Douglas' dissent rate jumped to 41.3%, his highest since the October 1953 Term, first of the Warren era. Brennan's dissent rate doubled; Marshall's quintupled. As a result, the liberals' dissent rates were substantially higher than those of the conservatives. The liberals had not lost as badly since the October 1953 Term.¹⁴

Several factors contributed to the establishment of conservative dominance in the October 1970 Term. The most important of these factors is that Harry Blackmun, Nixon's second appointee, was seated on the first day of the Term to replace Fortas. Blackmun was selected by Nixon as a conservative proxy vote for Burger, and he fulfilled this expectation in his first term, agreeing with the Chief in 95.3% of the cases. In fact, Blackmun had the most conservative voting record on the Court during the Term.

A second factor is that the moderate Justices — Black, White, and Stewart — lined up strongly with the conservatives, giving the right a 6-3 vote edge. Black, for example, was substantially closer to Burger and Blackmun than to the Douglas, Brennan, Marshall bloc. White and Stewart posted voting records which were at least as conservative as Harlan's. The shift from liberal to conservative dominance in the 1968-71 period is illustrated in table 3.

13. 399 U.S. 78 (1970). Black, Douglas and Marshall dissented.

14. See Galloway, *The First Period of the Warren Court: Emergence of Judicial Liberalism (1953-1957)*, 18 SANTA CLARA L. REV. 609, 639 (1978).

TABLE 3

DISSENT RATES—OCTOBER 1968, 1969 & 1970 TERMS			
JUSTICE	OCT. 1968 TERM	OCT. 1969 TERM	OCT. 1970 TERM
LIBERAL			
Douglas	22.2%	27.9%	41.3%
Brennan	2.0%	12.5%	29.6%
Marshall	6.7%	5.1%	27.1%
CONSERVATIVE			
Harlan	32.7%	14.9%	17.6%
Burger		29.1%	13.0%

The new conservative dominance was reflected in numerous conservative landmark decisions issued in the October 1970 Term. The most famous and characteristic of these was *Younger v. Harris*,¹⁵ which took the classic line of federal judicial restraint, holding that federal courts must not intervene in state court proceedings except in the most extraordinary circumstances. *Younger*, which represented a substantial retreat from the Warren Court's decision in *Dombrowski v. Pfister*,¹⁶ revealed the early Burger Court's primary strategy for dealing with the many Warren Court doctrines that were no longer congenial, but could not easily be overruled *en masse*: the Court would erect threshold barriers preventing lower courts from reaching the merits, so as to restrict the use of the old liberal-activist rules. This doctrine of nonintervention provided a perfect threshold barrier that effectively negated Warren era first amendment law without overruling it explicitly.

A number of liberal landmark decisions also came down during the October 1970 Term, including the Pentagon Papers case, *New York Times Company v. United States*,¹⁷ and the busing case, *Swann v. Charlotte-Mecklenburg Board of Education*.¹⁸ Still, the Court's conservative shift was clear.

During the October 1971 Term, third of the Burger era, the conservative wing obtained a stranglehold on the Court with the arrival of Nixon's third and fourth appointees, Lewis F. Powell, Jr. and William H. Rehnquist. These two conservatives were seated on January 7, 1972 to replace Hugo Black and John Marshall Harlan,

15. 401 U.S. 37 (1971). Douglas dissented.

16. 380 U.S. 479 (1965).

17. 403 U.S. 713 (1971). Burger, Blackmun and Harlan dissented.

18. 402 U.S. 1 (1971) (9-0 decision).

and promptly lined up on the far right, strengthening the Burger-Blackmun wing. The Powell and Rehnquist appointments completed the swing to the right that characterized the first phase of the Burger era and initiated a second, more conservative period in which liberal activism faded rapidly.

B. The Nixon Court: Conservative Dominance (1972-1977)

The seating of Powell and Rehnquist marked the start of five years in which the Court was dominated by the four Nixonians. This was the heyday of the "Nixon Court," and it witnessed the most conservative series of cases since the Court's attack on the New Deal in the mid-1930's.¹⁹ The typical alignment during this period is shown in the following table:

TABLE 4
ALIGNMENT OF JUSTICES—OCTOBER 1971 THROUGH
1974 TERMS

LEFT	CENTER	RIGHT
Douglas	White →	Rehnquist
Brennan	Stewart →	Burger
Marshall		Powell
		Blackmun

The four Nixonians stayed closely together during the October 1971 Term, their first on the Court. Burger and Powell initiated their long-lasting partnership, agreeing in 92.1% of the cases before the Court. The four Nixonians dominated the Court, picking up the fifth vote in most cases from White, who moved sharply to the right. Naturally the Court's most liberal member, William O. Douglas, was distraught. Douglas dissented in 43.8% of the cases, the highest dissent rate of any Justice since the Vinson era,²⁰ and he posted astronomical disagreement rates with Rehnquist (61.5%), Burger (60.9%), Powell (58.1%), and Blackmun (57.9%).

The October 1971 Term brought a flood of conservative landmark decisions as the four Nixonians began rewriting Warren Court law. In *Jefferson v. Hackney*,²¹ the Court held for the first

19. An argument could be made that the 1949-53 Vinson Court was more conservative. See Galloway, *The Vinson Court: Polarization (1946-1949) and Conservative Dominance (1949-1953)*, 22 SANTA CLARA L. REV. 375 (1982).

20. Douglas' dissent rate in the October 1952 Term, last of the Vinson era, was 50%. *Id.* at 418.

21. 406 U.S. 535 (1972). Douglas, Brennan, Stewart and Marshall dissented.

time, that non-facial racial classifications are not suspect unless motivated by an intent to harm minorities. Similarly, *Kirby v. Illinois*²² curbed the expansion of the sixth amendment right to counsel, holding that there is no right to counsel at a lineup conducted before the start of a formal criminal prosecution. The Court also ended the expansion of "state action" theory in *Moose Lodge No. 107 v. Irvis*,²³ holding that racial discrimination by private clubs does not violate the equal protection clause. *Laird v. Tatum*²⁴ raised still more threshold barriers, holding that the Army's domestic surveillance program does not present a justiciable first amendment issue despite its obvious chilling effect on freedom of association. The Warren Court's "new property" revolution came to an end in *Board of Regents v. Roth*,²⁵ which held that procedural due process is inapplicable when, under state law, a benefit is defined as a "mere expectancy." Finally, *Branzburg v. Hayes*²⁶ launched the Nixon Court's war against the press, holding that reporters may be jailed for refusing to disclose names of confidential sources.

The October 1972 Term, fourth of the Burger era, had some of the most vivid voting patterns in the history of the United States Supreme Court, patterns which revealed unequivocal conservative dominance. Dissent rates on the left continued their dramatic climb. All three liberals posted the highest dissent rates of their careers up to that time. Marshall's dissent rate (32.6%) was five times as high as in the last Term of the Warren era. Brennan's (34.8%) was seventeen times as high. Most startling of all, Douglas' dissent rate shot up to 50.7%, the highest of any Justice since the February 1795 Term; Douglas dissented in 71 out of 140 cases.²⁷ The following data on the dissent rates graphically portray the Court's sharp shift to the right in the 1968-72 period.

22. 406 U.S. 682 (1972). Douglas, Brennan, White and Marshall dissented.

23. 407 U.S. 163 (1972). Douglas, Brennan and Marshall dissented.

24. 408 U.S. 1 (1972). Douglas, Brennan, Stewart and Marshall dissented.

25. 408 U.S. 564 (1972). Douglas, Brennan and Marshall dissented.

26. 408 U.S. 665 (1972). Douglas, Brennan, Stewart and Marshall dissented.

27. In contrast, Burger, Blackmun, and Powell dissented much less than in the prior term. Douglas dissented nearly twice as much as those three conservatives combined. Among the conservatives, only Rehnquist dissented with much frequency, calling from the far right for an even more rapid roll-back of Warren-brand liberal activism.

TABLE 5

DISSENT RATES—OCTOBER 1968, 1971 & 1972 TERMS

JUSTICE	OCT. 1968 TERM	OCT. 1971 TERM	OCT. 1972 TERM
LIBERAL			
Douglas	18.3%	43.8%	50.7%
Brennan	2.0%	31.5%	34.8%
Marshall	6.7%	25.6%	32.6%
CONSERVATIVE			
Powell		19.0%	10.6%
Blackmun		16.5%	8.7%
Burger		18.6%	13.6%

Polarization between the Justices at the Court's right and left extremes reached extravagant levels during the October 1972 Term. Rehnquist and Douglas disagreed in 92 out of 139 cases. Their disagreement rate (66.2%) was a modern Supreme Court record, the highest since the 1790's.²⁸ Douglas posted disagreement rates above 50% with five Justices.²⁹

The conservative dominance characteristic of the October 1972 Term was made possible by Byron R. White's suprisingly consistent support of the four Nixonians. Continuing his sharp swing to the right, White actually had a more conservative record during the Term than Blackmun and Powell. White disagreed with Douglas in 57.2% of the cases.

With White's help, the four Nixonians continued their assault on Warren era doctrines, issuing numerous landmark decisions. *San Antonio Independent School District v. Rodriguez*,³⁰ the famous Texas school finance case, abruptly halted extension of both the fundamental rights and suspect classification strands of equal protection law. *Schneckloth v. Bustamonte*³¹ launched the Nixon Court's assault on the fourth amendment, holding that a consent search is valid even though the person consenting was unaware of his right to refuse. *Miller v. California*³² rewrote obscenity law to make it easier for prosecutors to obtain convictions. The conservative flood of the mid-1970's continued to wash away the old liberal landmarks.

28. This conclusion is based on the author's analysis of dissent rates from 1790 to the present.

29. See Galloway, *The First Decade of the Burger Court*, *supra* note 7, at 908.

30. 411 U.S. 1 (1973). Douglas, Brennan, White and Marshall dissented.

31. 412 U.S. 218 (1973). Douglas, Brennan and Marshall dissented.

32. 413 U.S. 15 (1973). Douglas, Brennan, Stewart and Marshall dissented.

The conservative trend in the Court's decisions during the October 1972 Term was in line with the mood of the American people. During that year, Nixon won a landslide victory over liberal George McGovern. However, the Court's conservatism was not entirely consistent. The October 1972 Term was also the year in which the famous abortion case, *Roe v. Wade*,³³ was decided.

The October 1973 and 1974 Terms, fifth and sixth of the Burger era, were much like the October 1972 Term. These were the peak years of the Nixon Court. The four Nixonians dominated the Court with timely help from White and Stewart, and wrote Nixon's platform of conservatism and judicial restraint into the law of the land. The liberal trio of Douglas, Brennan, and Marshall, accounted for roughly two-thirds of the Court's dissents, protesting against the conservative tide.

During the October 1973 Term, White moved back toward the liberal wing, leaving a gap in the conservative majority. Stewart, however, moved substantially to the right and secured the conservative dominance. The conservative victories continued, and several landmark decisions were issued. In *United States v. Robinson*,³⁴ for example, the Court conferred upon police an absolute, unqualified authority to conduct general searches of custodial arrestees. *Edelman v. Jordan*³⁵ converted the eleventh amendment into a barrier banning orders requiring states to pay welfare benefits. In *Ross v. Moffitt*,³⁶ the conservatives ended the Warren Court's equal protection revolution on behalf of indigent criminal defendants, converting the *Griffin-Douglas* "equal access" rule into what Professor Laurence Tribe has called a "minimal access" rule.³⁷ The famous *Richardson* and *Schlesinger* cases³⁸ made standing into a formidable threshold barrier, closing the courthouse doors to public interest litigation. *Milliken v. Bradley*³⁹ hastened America's resegregation by banning school desegregation orders against suburban school districts, absent proof of participation in the segregation of inner-city schools. Although the Watergate scandal may have halted the conservative trend in the executive branch, the swing to the right contin-

33. 410 U.S. 113 (1973). White and Rehnquist dissented.

34. 414 U.S. 218 (1973). Douglas, Brennan and Marshall dissented.

35. 415 U.S. 651 (1974). Douglas, Brennan, Marshall and Blackmun dissented.

36. 417 U.S. 600 (1974). Douglas, Brennan and Marshall dissented.

37. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1098-99 (1978).

38. *United States v. Richardson*, 418 U.S. 166 (1974); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974). Douglas, Brennan, and Marshall dissented in both cases. Stewart also dissented in *Richardson*.

39. 418 U.S. 717 (1974). Douglas, Brennan, White and Marshall dissented.

ued on the Supreme Court.

Voting patterns for the October 1974 Term, sixth of the Burger era, provide a good illustration of the Justices' normal alignments during the period of conservative dominance in the mid-1970's. The most conservative records were posted by Rehnquist, Burger, Powell, and Blackmun respectively. Farther to the left, but still distinctly right-of-center, were the swing Justices, White and Stewart. The most liberal records belonged to Douglas, Brennan, and Marshall. Dissent rates on the left dropped somewhat, but the three liberals still cast more total dissents (113) than the other six Justices (97).

The case which best illustrates the conservatism of the October 1974 Term is *Warth v. Seldin*,⁴⁰ the landmark standing case and *bete noir* of public interest law. In *Warth*, the door-closing strategy of the Burger Court reached a new peak. As the dissenters pointed out, the panoply of threshold barriers erected by the conservative majority made it nearly impossible for *anyone* to reach the merits of such a claim.⁴¹ This result was precisely the purpose of the four Nixonians in establishing those barriers. The door-closing strategy was also evident in other cases decided in the October 1974 Term, such as *Hicks v. Miranda*,⁴² which extended the *Younger* nonintervention doctrine, and *Jackson v. Metropolitan Edison Company*,⁴³ which narrowed both the public function and nexus strands of state action law.

In the October 1975 Term, seventh of the Burger era, the liberal wing suffered another defeat. William O. Douglas, the Court's most liberal member, resigned after participating in only one case. The selection of Douglas' successor fell to his old nemesis and tormentor, Gerald Ford, who had led the effort to impeach Douglas in the late 1960's. Constrained, perhaps, by the need to mend fences in the post-Watergate era, Ford appointed the surprisingly moderate John Paul Stevens, who promptly staked out a position as the Court's third most liberal Justice.

The Douglas-Stevens succession isolated Brennan and Marshall in the liberal wing. For the first time since the early 1950's, the number of liberals was reduced to two. The following table shows the lineup on the Court during Steven's first two Terms.

40. 422 U.S. 490 (1975). Douglas, Brennan, White and Marshall dissented.

41. The case involved a challenge to the exclusionary zoning law of Penfield, New York, a Rochester suburb.

42. 422 U.S. 332 (1975). Douglas, Brennan, Stewart and Marshall dissented.

43. 419 U.S. 345 (1974). Douglas, Brennan and Marshall dissented.

TABLE 6
ALIGNMENT OF JUSTICES—OCTOBER 1975 & 1976
TERMS

LEFT	CENTER	RIGHT
Brennan	White →	Rehnquist
Marshall	Stewart →	Burger
	Stevens	Powell
		Blackmun

The conservatives were obviously in control.

The conservative dominance that characterized the October 1975 Term appears vividly in the data on dissents. Powell's dissent rate was a miniscule 4.4%; low rates were also posted by Burger (9.4%) and Blackmun (13.0%). In contrast, Brennan set a new personal record dissent rate of 38.4%, and Marshall's 34.8% rate was also much higher than those of the conservatives.

A tremendous number of landmark conservative decisions were issued in the October 1975 Term. For example, *Rizzo v. Goode*⁴⁴ used the justiciable case requirement to shield Philadelphia's mayor, Frank Rizzo, from charges of racial discrimination. *Hudgens v. NLRB*⁴⁵ overruled a Warren Court landmark and held that shopping centers are not governed by the first amendment. *Paul v. Davis*⁴⁶ and *Kelley v. Johnson*⁴⁷ restricted procedural due process by adopting a narrow definition of "liberty." *Washington v. Davis*⁴⁸ definitively established the restrictive "evil motive" test, nullifying the equal protection clause in cases involving non-facial racial and sexual classifications. Another Warren Court landmark fell in *National League of Cities v. Usery*,⁴⁹ which resurrected the discredited tenth amendment, and nullified Congress' attempt to apply the Fair Labor Standards Act to local governments. *Young v. American Mini Theatres*⁵⁰ adopted a permissive approach to content-based infringements of free speech. In *Pasadena Board of Education v. Spangler*,⁵¹ the Court stripped the district courts' power to modify school desegrega-

44. 423 U.S. 362 (1976). Brennan, Marshall and Blackmun dissented.

45. 424 U.S. 507 (1976). Brennan and Marshall dissented.

46. 424 U.S. 693 (1976). Brennan, White and Marshall dissented.

47. 425 U.S. 238 (1976). Brennan and Marshall dissented.

48. 425 U.S. 229 (1976). Brennan and Marshall dissented.

49. 426 U.S. 833 (1976). Brennan, White, Marshall and Stevens dissented.

50. 427 U.S. 50 (1976). Brennan, White, Marshall and Blackmun dissented.

51. 427 U.S. 424 (1976). Brennan and Marshall dissented.

tion decrees to neutralize white flight. *Andresen v. Maryland*⁵² overturned two centuries of precedents and declared that the privilege against self-incrimination no longer bars the use of forcibly seized documents. In *Gregg v. Georgia*,⁵³ the Court made clear its view that capital punishment was not a cruel and unusual punishment. *Stone v. Powell*⁵⁴ held that fourth amendment violations may not normally be raised in habeas corpus proceedings.

Thus, the 1975 Term was a conservative avalanche. Based on this series of decisions, a strong case can be made that the October 1975 Term was the most conservative Term in the 1970's and that 1976, the nation's bicentennial, saw the fall of more civil liberties than any year since the McCarthy era.

The October 1976 Term, eighth of the Burger era, was the seventh straight Term marked by conservative dominance. The two liberals, Brennan and Marshall, again posted the highest dissent rates on the Court, filing more dissents (91) than all four Nixonians combined (71). The flood of conservative landmarks abated somewhat from its peak in the prior Term, but major conservative victories were still abundant. For example, *United States Trust Company v. New Jersey*⁵⁵ initiated the modern resuscitation of the contract clause. The *Teamsters* trilogy, led by *International Brotherhood of Teamsters v. United States*,⁵⁶ marked the end of liberal activism in Title VII (employment discrimination) cases. In *Trainor v. Hernandez*,⁵⁷ the nonintervention doctrine was taken to still greater lengths. Further, *Beale v. Doe*⁵⁸ suggested that the Court's pro-abortion majority was losing its hold.

The more interesting aspects of the 1976 Term, however, were the initial signs of an emerging shift to the left. The three most conservative Justices, Rehnquist, Burger, and Powell, dissented more than in the prior Term,⁵⁹ as more liberal landmarks were handed down than in several prior Terms. *Craig v. Boren*⁶⁰ signalled the Court's readiness to engage in liberal activism in sex discrimination cases, adopting for the first time the "intermediate" level of means-

52. 427 U.S. 463 (1976). Brennan and Marshall dissented.

53. 428 U.S. 153 (1976). Brennan and Marshall dissented.

54. 428 U.S. 465 (1976). Brennan, White and Marshall dissented.

55. 431 U.S. 1 (1977). Brennan, White and Marshall dissented.

56. 431 U.S. 324 (1977). Brennan and Marshall dissented.

57. 431 U.S. 434 (1977). Brennan, Stewart, Marshall and Stevens dissented.

58. 432 U.S. 438 (1977). Brennan, Marshall and Blackmun dissented.

59. See Galloway, *The First Decade of the Burger Court*, *supra* note 7, at 955.

60. 429 U.S. 190 (1976). Burger and Rehnquist dissented.

end scrutiny. *Brewer v. Williams*⁶¹ revitalized the "deliberate elicitation" strand of sixth amendment right-to-counsel doctrine. In *Moore v. City of East Cleveland*,⁶² the Court struck down an anti-hippie law and suggested a willingness to expand the noninterpretive right of privacy beyond contraception and abortion cases. Surprisingly, Chief Justice Burger wrote a pro-fourth amendment opinion in *United States v. Chadwick*.⁶³ In addition, *Bates v. State Bar*⁶⁴ struck down a ban on attorney advertising, confirming the recent extension of the first amendment to commercial speech.

Given these trends, it is perhaps appropriate to consider the October 1976 Term as a transition Term, in which the Court began to step back from the conservative pattern of the October 1971 through 1975 Terms. Ironically, this may have been due in part to the departure of Douglas, the Court's most liberal member, in 1975. Perhaps the Douglas-Stevens succession actually nudged the Court to the left by eliminating the liberal wing's tendency to take extreme positions and by adding a strong, independent Justice to the Court's centrist bloc.⁶⁵ Also, the nation was swinging slightly leftward in the 1976-77 period, as evidenced by Jimmy Carter's victory over Gerald Ford in 1976, which ended eight years of Republican rule. Whatever the cause, by the end of the October 1976 Term, "[t]he center was in control."⁶⁶

C. *The Conservative Trend Abates (1977-1982)*

A trend toward moderation on the Supreme Court emerged in the late 1970's, coinciding with a more moderate pattern in American politics. From 1977 to 1981, the middle-of-the-road Democrat, Jimmy Carter, occupied the White House, and liberals had a stronger hand in Congress. The abatement of the conservative trend that marked the Nixon and Ford years was a minor one, which perhaps was not enough to produce a separate period of either American or Supreme Court history, but it provided a change of pace from the conservative dominance that preceded and followed it.

The softening of conservative dominance on the Supreme Court

61. 430 U.S. 387 (1977). Burger, White, Blackmun and Rehnquist dissented.

62. 431 U.S. 494 (1977). Burger, White, Stewart and Rehnquist dissented.

63. 433 U.S. 1 (1977). Blackmun and Rehnquist dissented.

64. 433 U.S. 350 (1977). Burger, Stewart, Rehnquist and Powell dissented in part and concurred in part.

65. Stevens, in his first full term, lined up a little left-of-center, closer to the Brennan-Marshall pole than to the Rehnquist-Burger pole.

66. R. WOODWARD & S. ARMSTRONG, *THE BROTHERS* 444 (1979).

during the 1977-1982 period reflected several factors. As mentioned above, Stevens' arrival in 1975 gave additional credibility to the Court's moderate, centrist group. At the same time, White loosened his ties with the four Nixonians. This created a potential five-vote coalition of moderates and liberals — White, Stewart, Stevens, Marshall, and Brennan — that might challenge the dominance of the four Nixonians.

Most important, however, was a dramatic shift to the left by Harry Blackmun. The four Nixonians became a trio, and they now faced the more difficult task of obtaining two votes from a six-vote pool of moderates and liberals.

The October 1977 Term, ninth of the Burger era, was the first in which these new patterns became evident. Voting profiles for that Term were strikingly different from prior Terms.⁶⁷ White moved to the left of the Court's statistical center for the first time since the October 1963 Term, disagreeing with Rehnquist (40.3%) and Burger (34.9%) more than with Brennan (31.5%) and Marshall (29.9%). Stewart also moved to the left, into a position almost exactly in the center between the right and left extremes. Blackmun moved sharply to the left. His disagreement rates with Rehnquist and Burger were triple their level during the October 1973 Term, and he disagreed with Rehnquist (41.3%) nearly as much as with Brennan (42.2%) and Marshall (41.7%). Even Powell moved substantially to the left into a position near the Court's center, but his shift proved to be short-lived.

As a result of these changes, the Court had a 2-5-2 voting alignment during the October 1977 Term. Rehnquist and Burger held down the right extreme; Brennan and Marshall the left; and the remaining five Justices were in the center. The result was a significant swing to the left in the balance of power. Dissent rates on the right jumped substantially, while dissent rates on the left dropped. After seven consecutive Terms in which the liberals cast most of the dissents, the dissent rates in the October 1977 Term were almost equal on the right and left.

The following table shows the changes in the voting patterns of the Justices at the Court's extremes in the October 1976 and 1977 Terms.

67. See Galloway, *The First Decade of the Burger Court*, *supra* note 7, at 891, 921-25, 950, 956, for a detailed discussion of voting data for the Term.

TABLE 7
DISSENT RATES—OCTOBER 1976 & 1977 TERMS

JUSTICE	OCT. 1976 TERM	OCT. 1977 TERM	CHANGE
LIBERAL			
Brennan	37.3%	34.3%	— 8.0%
Marshall	35.5%	28.3%	— 25.4%
CONSERVATIVE			
Burger	16.8%	22.5%	+ 33.3%
Rehnquist	21.8%	30.2%	+ 38.5%

The shift to the left in the balance of power during the October 1977 Term was reflected in a series of liberal victories. *Zablocki v. Redhail*⁶⁸ extended the constitutional right of privacy to choices concerning marriage partners. *Memphis Light, Gas & Water Division v. Craft*⁶⁹ held that procedural due process requires at least an informal chance to be heard prior to termination of gas and electricity. In *Marshall v. Barlow's Inc.*,⁷⁰ the Court rejected an attempt to throw out the Warren Court's administrative search warrant requirement. *Monell v. Department of Social Services*⁷¹ overruled a William O. Douglas decision exempting municipal corporations from civil rights liability under 42 U.S.C. Section 1983. And, in one of the most famous cases of the decade, *University of California Regents v. Bakke*,⁷² the Court held that race-conscious affirmative action programs do not *per se* violate the equal protection clause.

This trend, however, was far from a liberal sweep. Rehnquist and Burger retained a slight edge over Brennan and Marshall during the Term, and the conservatives won some major victories. For example, *Scott v. United States*,⁷³ the so-called "Dread Scott" case, weakened both statutory and constitutional restraints on electronic surveillance; *Zurcher v. Stanford Daily*⁷⁴ approved searches of newspapers' files; *Allied Structural Steel Company v. Spannaus*⁷⁵ revived the contract clause as a barrier to economic reform legisla-

68. 434 U.S. 374 (1977). Rehnquist dissented.

69. 436 U.S. 1 (1978). Burger, Rehnquist and Stevens dissented.

70. 436 U.S. 307 (1978). Blackmun, Rehnquist and Stevens dissented.

71. 436 U.S. 658 (1978). Burger and Rehnquist dissented.

72. 438 U.S. 265 (1978). Brennan, White, Marshall and Blackmun dissented to the left; Burger, Stewart, Rehnquist and Stevens dissented to the right.

73. 436 U.S. 128 (1978). Brennan and Marshall dissented.

74. 436 U.S. 547 (1978). Stewart, Marshall and Stevens dissented. Brennan did not participate.

75. 438 U.S. 234 (1978). Stewart, Marshall and Stevens dissented.

tion; and *FCC v. Pacifica Foundation*⁷⁶ confirmed the Court's permissive attitude toward content-based infringements of free speech. Still, the October 1977 Term was much more moderate than the prior seven Terms.

During the October 1978 Term, tenth of the Burger era, the Court moved back to the right. Once again, by a wide margin, the highest dissent rates were posted by the liberals, Brennan and Marshall. Rehnquist's dissent rate dropped by more than one-third; Powell moved sharply back to the right into his usual close alignment with Chief Justice Burger; and White and Stewart shifted slightly to the right as well.

Significantly, however, Blackmun did not move back into the right wing; he was slightly right-of-center. Stevens, once again was slightly left-of-center. White was almost exactly in the middle. Thus, a six-vote coalition of moderates and liberals — Blackmun, White, Stewart, Stevens, Marshall, and Brennan — was ready to challenge the three Nixonians for control of the Court. The line-up that emerged in the late 1970's and lasted for the most part until Stewart's resignation at the end of the October 1980 Term, is illustrated in the following table.

TABLE 8
ALIGNMENT OF JUSTICES—OCTOBER 1978-80 TERMS

LEFT	CENTER	RIGHT
Brennan	Stewart →	Rehnquist
Marshall	White	Burger
	Blackmun	Powell
	← Stevens	

The continuing shakiness of the right wing's dominance is reflected in the voting data for the October 1978 Term. Burger and Powell dissented with much greater frequency than two Terms before, while Brennan and Marshall dissented slightly less frequently. Perhaps the best evidence for the hypothesis that a moderate trend occurred during the October 1978 Term are the cases decided in that Term. An important liberal trend appeared in race cases. *Columbus Board of Education v. Pennick*⁷⁷ and *Dayton Board of Education v. Brinkman*⁷⁸ revealed a surprisingly favorable attitude toward school desegregation after several years of crushing defeats

76. 438 U.S. 726 (1978). Brennan, Stewart, Marshall and White dissented.

77. 443 U.S. 449 (1979). Rehnquist and Powell dissented.

78. 443 U.S. 526 (1979). Burger, Stewart, Rehnquist and Powell dissented.

for civil rights activists. In a closely watched affirmative action case, *United Steelworkers v. Weber*,⁷⁹ the Court held that remedial preferences for minority employees do not automatically violate Title VII of the Civil Rights Act of 1964. In addition, several decisions suggested a tendency toward liberal activism in the sex discrimination field,⁸⁰ and *Colautti v. Franklin*⁸¹ demonstrated that the Court's pro-abortion wing could still prevail in some divided cases.⁸²

The October 1979 Term, eleventh of the Burger era, was characterized by the same two trends as the prior Term. Once again the Court's conservative wing dominated in most cases. Chief Justice Burger, the Court's second most conservative Justice, had the lowest dissent rate (13.0%) of the Justices. Powell, the third most conservative Justice, was not far behind, with a dissent rate approximating half of that of Brennan and Marshall. On the other hand, the conservative dominance was not as complete as in earlier Terms. The Court's most conservative member, Rehnquist, dissented in 33.0% of the cases, a 73% increase from the prior Term. Meanwhile, the liberals' dissent rates dropped slightly. Brennan's dissent rate was 32.1%, lower than Rehnquist's. The liberals' improved record resulted from the support of Stevens, who was again slightly left-of-center; Blackmun, who was now the fourth most liberal Justice; and White, who was near the center. Significantly, Blackmun disagreed more with Rehnquist (42.7%) than with Brennan (34.6%) and Marshall (32.8%).

The flow of major liberal victories characteristic of the late 1970's continued. The two most famous cases, both decided on the

79. 443 U.S. 193 (1979). Burger and Rehnquist dissented.

80. *E.g.*, *Caban v. Mohammed*, 441 U.S. 380 (1979) (Burger, Stewart, Rehnquist and Stevens dissented); *Canon v. University of Chicago*, 441 U.S. 677 (1979) (White, Blackmun and Powell dissented); *Davis v. Passman*, 442 U.S. 228 (1979) (Burger, Stewart, Rehnquist and Powell dissented); *Califano v. Westcott*, 443 U.S. 761 (1979) (Burger, Stewart, Rehnquist and Powell concurred in part and dissented in part).

81. 439 U.S. 379 (1979). Burger, White and Rehnquist dissented.

82. In contrast, a series of conservative decisions made it clear that the liberal trend did not extend to criminal procedure cases. *Gannett Co. v. De Pasquale*, 443 U.S. 368 (1979), for example, held that certain preliminary proceedings in criminal prosecutions could be closed to the public; *Scott v. Illinois*, 440 U.S. 367 (1979), cut off further development of the *Gideon-Argersinger* line by holding that criminal defendants do not have a sixth amendment right to appointed counsel in prosecutions which do not result in actual imprisonment; *Rakas v. Illinois*, 439 U.S. 128 (1978), the landmark case that reconceptualized the "standing" component of fourth amendment law, held that persons legitimately on the premises do not automatically have a right to invoke the exclusionary rule when those premises are illegally searched. Brennan and Marshall dissented in all three cases; Stevens, Blackmun, and White joined them in two cases each. Apart from the criminal procedure arena, however, the conservatives did not post their usual quota of major victories in the October 1978 Term.

last day of the Term, were *Richmond Newspapers, Inc. v. Virginia*,⁸³ the first case acknowledging a first amendment right of access to criminal trials, and *Fullilove v. Klutznick*,⁸⁴ which upheld a statute requiring that a percentage of public works contracts be set aside for minority contractors. The Court unanimously confirmed its Holmesian economic restraint in *Pruneyard Shopping Center v. Robins*,⁸⁵ which permitted states to require that private shopping centers provide access to the public for first amendment activities, and in *Agins v. City of Tiburon*,⁸⁶ which held that local zoning restrictions do not constitute a taking for which compensation must be given. *Ybarra v. Illinois*⁸⁷ and *Payton v. New York*⁸⁸ breathed new life into the fourth amendment by enforcing the rule against general "dragnet" searches and tightening restrictions on searches of homes. *Carey v. Brown*⁸⁹ reinstated the strong presumption against content-based infringements of free expression, which had appeared shaky in the aftermath of the *American Mini Theatres* and *Pacifica Foundation* cases. In all, October 1979 was a surprisingly strong Term for the liberals. Although the conservative wing won a few landmark cases, those victories were outnumbered by the victories of the liberals.

Voting data for the October 1980 Term, twelfth of the Burger era, suggest a shift back toward the conservative dominance that was the most common trait of the Burger Court. The dissent rates of Rehnquist (20.0%), Burger (14.8%), and Powell (13.6%) were substantially lower than those of Marshall (34.1%) and Brennan (30.3%). Although the imbalance was not as extreme as in the early and mid-1970's, the conservative edge was markedly greater than in the October 1977 and 1979 Terms. The shift to the right was made possible by the conservative voting record of Potter Stewart, who was in his last Term on the Court. White was also slightly right of center, while Blackmun was slightly left of center.

Moreover, the surprising flow of major liberal victories that marked the prior three Terms evaporated considerably in the October 1980 Term. The most famous decisions of the Term were conservative victories over dissents by the liberals. Especially noteworthy

83. 448 U.S. 555 (1980). Rehnquist dissented.

84. 448 U.S. 448 (1980). Stewart, Rehnquist and Stevens dissented.

85. 447 U.S. 74 (1980) (9-0 decision).

86. 447 U.S. 255 (1980) (9-0 decision).

87. 444 U.S. 85 (1979). Burger, Blackmun and Rehnquist dissented.

88. 445 U.S. 573 (1980). Burger, White and Rehnquist dissented.

89. 447 U.S. 455 (1980). Burger, White and Rehnquist dissented.

were the equal protection cases: *Michael M. v. Superior Court*,⁹⁰ upholding California's sexually discriminatory statutory rape law; *Rostker v. Goldberg*,⁹¹ upholding the male-only federal draft registration law; *United States Railroad Retirement Board v. Fritz*,⁹² upholding a mandatory retirement rule for 65-year-old railroad workers; and *Ball v. James*,⁹³ upholding an electoral system that denied the vote to nonproperty-owners.

Conservative dominance was also evident in other areas of law. The Court resumed its assault on the fourth amendment in *Michigan v. Summers*,⁹⁴ by expanding police authority to conduct "limited intrusions" without probable cause, and in *New York v. Belton*,⁹⁵ by authorizing general searches of automobile passenger compartments incident to arrests of drivers. *Lassiter v. Department of Social Services*⁹⁶ denied indigent parents the right to court-appointed counsel in proceedings to terminate parental rights.

The Court's decisions during the October 1980 Term may have been, in part, a response to the conservative trend in the nation at large, which was evidenced by the election of conservative Ronald Reagan to the presidency. The Court (of course) follows the election returns. The October 1980 Term suggests that the Burger Court, after a brief moderate trend in the Carter years, was preparing to resume the conservative path of the mid-1970's.

The October 1981 Term, thirteenth of the Burger era, saw a new lineup on the Supreme Court. Potter Stewart, a moderate conservative, had resigned at the end of the prior Term, and Sandra Day O'Connor, the first woman Justice, was sworn in on the first day of the new Term to fill the seat.

The Stewart-O'Connor succession was an important one. Blackmun's defection in 1977 had made it more difficult for the conservative wing to dominate the Court. O'Connor, who was Reagan's first appointee, was Rehnquist's colleague at Stanford Law School. As a Goldwater Republican from Arizona, O'Connor was a perfect candidate to fill the gap in the right wing. Indeed, in her first term, O'Connor was closest to Rehnquist (88.6% agreement rate) and farthest from Brennan (58.5% agreement rate). The "four horseper-

90. 450 U.S. 464 (1981). Brennan, White, Marshall and Stevens dissented.

91. 453 U.S. 57 (1981). Brennan, Marshall and White dissented.

92. 449 U.S. 166 (1980). Brennan and Marshall dissented.

93. 451 U.S. 355 (1981). Brennan, White, Marshall and Blackmun dissented.

94. 452 U.S. 692 (1981). Brennan, Stewart and Marshall dissented.

95. 453 U.S. 454 (1981). Brennan, White and Marshall dissented.

96. 452 U.S. 18 (1981). Brennan, Marshall, Blackmun and Stevens dissented.

sons," Rehnquist, O'Connor, Burger, and Powell, had replaced the four Nixonians as the strongest bloc on the Court, and it appeared as if a new era of conservative dominance, perhaps even harsher than the mid-1970's, had begun.

Surprisingly, however, the conservatives did *not* dominate the October 1981 Term. Instead, the moderate trend that began in 1977 continued. Dissent rates dropped substantially on the left and rose substantially on the right. For the first time since the October 1969 Term, dissent rates were higher on the right than on the left.⁹⁷

The following table shows the unexpected changes in patterns of dissent at the Court's right and left extremes.

TABLE 9

DISSENT RATES—OCTOBER 1980 & 1981 TERMS

JUSTICE	OCT. 1980 TERM	OCT. 1981 TERM	CHANGE
LIBERAL			
Brennan	30.3%	24.8%	- 18.2%
Marshall	34.1%	23.0%	- 32.6%
CONSERVATIVE			
Burger	14.8%	25.0%	+ 68.9%
Rehnquist	20.0%	28.4%	+ 42.0%

As in the October 1977, 1978, and 1979 Terms, the liberal wing scored victories in a series of important cases decided during the October 1981 Term. In *Santosky v. Kramer*,⁹⁸ the Court took a liberal-activist approach to procedural due process. In *Larson v. Valente*,⁹⁹ the Court held that government action discriminating on the basis of religious denomination is subject to strict scrutiny under the establishment clause. In *Plyler v. Doe*,¹⁰⁰ the liberals broke new ground, holding that somewhat suspect classifications burdening somewhat fundamental rights are subject to an intermediate presumption of unconstitutionality under the equal protection clause.

The conservatives also posted several landmark victories in the October 1981 Term, including a major win for Richard M. Nixon

97. The liberal edge in the won-lost column was largely attributable to Harry Blackmun, who was far to the left of the Court's statistical center, disagreeing with Rehnquist (38.6%) and Burger (36.6%) much more than with Brennan (21.4%) and Marshall (20.9%).

98. 455 U.S. 745 (1982). Burger, White, Rehnquist and O'Connor dissented.

99. 456 U.S. 228 (1982). Burger, White, Rehnquist and O'Connor dissented.

100. 457 U.S. 202 (1982). Burger, White, Rehnquist and O'Connor dissented.

in *Nixon v. Fitzgerald*,¹⁰¹ which held for the first time that Presidents are absolutely immune from civil liability for their official acts. Nevertheless, the liberals had a definite edge in major victories.

In summary, after trailing badly in the mid-1970's, the Supreme Court's liberal wing made a comeback in the late 1970's and early 1980's, ushering in a somewhat more moderate interlude in the predominantly conservative Burger era. The following table summarizes data showing that dissent rates rose substantially on the far right and fell marginally on the far left during the period in question.

TABLE 10
DISSENT RATES—OCTOBER 1971 THROUGH 1981
TERMS

JUSTICE	OCT. 1971- 1976 TERMS	OCT. 1977- 1981 TERMS	CHANGE
LIBERAL			
Brennan	34.8%	31.8%	— 8.6%
Marshall	31.5%	29.4%	— 6.7%
CONSERVATIVE			
Burger	13.8%	17.9%	+29.7%
Rehnquist	19.9%	26.4%	+32.7%

The strongest evidence of the abatement in the conservative dominance in the late 1970's and early 1980's is drawn from cases rather than voting statistics. In most important areas of law, the Court seemed to pause in order to consolidate the many changes made in the mid-1970's and curtail a few of the harsh results caused by the earlier conservative onslaught of the four Nixonians.

D. *Conservative Dominance (1982-1986)*

During the October 1982 and 1983 Terms, fourteenth and fifteenth of the Burger era, the United States Supreme Court moved distinctly to the right. This new, more conservative period became predictable when Sandra Day O'Connor replaced Potter Stewart in 1981. At that time, O'Connor filled the gap in the conservative wing caused by Harry Blackmun's swing to the left, and the four horsepersons became the strongest bloc on the Court. The conservatives needed only one vote from the three moderate conservatives, White, Blackmun, and Stevens, to win in divided cases. If Brennan

101. 457 U.S. 731 (1982). Brennan, White, Marshall and Blackmun dissented.

and Marshall, the two remaining liberals, could not mobilize the support of all three center judges, they had to penetrate the ranks of the four horsepersons and steal a vote to win. That was no easy task.

The new period of conservative dominance did not begin immediately after O'Connor's arrival, as has been demonstrated. Although O'Connor promptly lined up closest to Rehnquist, and the four horsepersons emerged as a voting bloc in the October 1981 Term, the liberals fared surprisingly well in O'Connor's first term, even gaining a slight edge in victories.

In contrast, the October 1982 Term, fourteenth of the Burger era and O'Connor's second, witnessed the emergence of more conservative voting patterns. The dissent rates of the five most conservative Justices fell; those of the four most liberal Justices rose. Rehnquist's dissent rate (22.0%) was down approximately one-quarter; Burger's (9.3%) was down 60%; Marshall's (32.2%) was up 40%. O'Connor lent strong support to the resurgent right wing, posting the second most conservative voting record on the Court and ousting Burger from his accustomed position next to Rehnquist.

Conservative dominance was strongest in the summer of 1983, at the end of the October 1982 Term. Marshall, who had the most liberal voting record during the Term, dissented in eighteen of the last twenty-two cases. Brennan joined Marshall in sixteen of the dissents; Blackmun, who was far to the left of the Court's statistical center during the Term, dissented in twelve of the cases; and Stevens joined the liberals in nine of the twenty-two cases. The conservative onslaught at the end of the October 1982 Term touched many of the standard fields of Supreme Court jurisdiction including equal protection, due process, freedom of religion, labor, tax, securities, and, of course, criminal procedure.¹⁰²

The October 1983 Term, fifteenth of the Burger era, witnessed a continuation of the shift to the right that began in the October 1982 Term. The dissent rates of the conservative Justices dropped

102. *E.g.*, *Michigan v. Long*, 463 U.S. 1032 (1983) (6-3 decision; fourth amendment); *Marsh v. Chambers*, 463 U.S. 783 (1983) (6-3 decision; establishment clause); *Illinois v. Andreas*, 463 U.S. 765 (1983) (6-3 decision; fourth amendment); *Mueller v. Allen*, 463 U.S. 388 (1983) (5-4 decision; establishment clause); *Jones v. United States*, 463 U.S. 354 (1983) (5-4 decision; procedural due process); *Lehr v. Robertson*, 463 U.S. 248 (1983) (6-3 decision; procedural due process & equal protection). Brennan and Marshall dissented in each of these cases except *Lehr*, where Brennan joined the majority. The liberals did win a few cases in the summer 1983 crunch, including *Solem v. Helm*, 463 U.S. 277 (1983) (5-4 decision), which salvaged the concept that the cruel and unusual punishment clause bans disproportionately long imprisonment. The most important case of the Term was *INS v. Chadha*, 462 U.S. 919 (1983) (7-2 decision), which held legislative vetoes unconstitutional.

sharply, while Brennan's dissent rate rose by more than one-third.¹⁰³ The three most liberal Justices, Brennan, Marshall, and Stevens, cast 143 dissents, while the remaining six, more conservative Justices cast only 97 dissents. In short, the conservatives were dominant, especially at the end of the Term, when Brennan dissented in all of his last ten cases, and 19 out of the final 24 cases.

The shift to the right in the 1981-84 period is shown in the following table.

TABLE 11
DISSENT RATES—OCTOBER 1981 & 1983 TERMS

JUSTICE	OCT. 1981 TERM	OCT. 1983 TERM	CHANGE
LIBERAL			
Brennan	24.8%	33.6%	+35.5%
Marshall	23.0%	31.0%	+34.8%
CONSERVATIVE			
Burger	25.0%	5.3%	-78.8%
O'Connor	19.7%	11.4%	-42.1%
Rehnquist	28.4%	16.8%	-40.8%

The October 1983 Term voting patterns were much more like those of the conservative mid-1970's than those of the more moderate 1977-82 period.

The conservatives' statistical dominance in the October 1983 Term was matched by conservative dominance in the numerous landmark cases decided during the Term. *United States v. Leon*,¹⁰⁴ for example, adopted the so-called "good faith exception" to the fourth amendment exclusionary rule. *Firefighters Local Union No. 1748 v. Stotts*¹⁰⁵ raised serious doubts about the future of affirmative action programs. In *Grove City College v. Bell*,¹⁰⁶ the Court all but eliminated the nondiscrimination requirements of Title IX of the Civil Rights Act of 1964. *Schall v. Martin*¹⁰⁷ authorized preventive detention of juveniles by denial of bail. *Regan v. Wald*¹⁰⁸ approved restrictions on travel to Cuba, revealing a very deferential judicial attitude toward the exercise of power by the Reagan executive

103. Brennan's dissent rate (33.6%) was six times as high as Burger's (5.3%).

104. 468 U.S. 897 (1984). Brennan, Marshall and Stevens dissented.

105. 467 U.S. 561 (1984). Brennan, Marshall and Blackmun dissented.

106. 465 U.S. 555 (1984). Brennan and Marshall dissented.

107. 467 U.S. 253 (1984). Brennan, Marshall and Stevens dissented.

108. 468 U.S. 222 (1984). Brennan, Marshall, Blackmun and Powell dissented.

branch. *Lynch v. Donnelly*¹⁰⁹ rejected an establishment clause challenge to the display of government nativity scenes in public parks. And *NLRB v. Bildisco Co.*¹¹⁰ authorized companies to suspend collective bargaining agreements unilaterally by filing bankruptcy.

The lineup that emerged in the October 1983 Term was as follows:

TABLE 12
ALIGNMENT OF JUSTICES—OCTOBER 1983 TERM

LEFT	CENTER	RIGHT
Brennan	White →	Rehnquist
Marshall	Blackmun	O'Connor
	← Stevens	Burger
		Powell

After the conservative onslaught in early 1984, many commentators speculated that the Court had entered a reactionary period and that Rehnquist, Burger, O'Connor, Powell, and White would continue to lead the Court in what Harry Blackmun called a "rightward plunge."¹¹¹ As the October 1984 Term unfolded, however, the liberal wing initially fared unexpectedly well. A series of important liberal victories in divided cases suggested that the conservative trend of the prior two Terms had abated.¹¹² By early 1985, articles began to appear claiming a "dramatic reversal" in the Court's previously reactionary pattern.¹¹³

109. 466 U.S. 994 (1984). Brennan, Marshall, Blackmun and Stevens dissented.

110. 465 U.S. 513 (1984). Brennan, White, Marshall and Blackmun dissented.

111. *E.g.*, Berbash & Kamen, *Supreme Court to Address Church-State Relations, Police Powers*, Washington Post, Sept. 30, 1984, at A4, col. 1, which stated:

A string of conservative victories in decisions last year and the expectations of similar gains this term have caused unprecedented anxiety in liberal quarters. . . . Some liberals, like Burt Neuborne, legal director of the American Civil Liberties Union, say they wish the curtain would never come up on the Supreme Court term that is about to begin. "I feel like the general Napoleon left behind to cover his retreat from Russia," Neuborne said. . . . Even Vincent Blasi, the Columbia University Law Professor who last year published a book called "The Burger Court: The Counter-revolution that Wasn't," says that after last term, all bets are off on that title. "The premises have changed," Blasi said. "We may be in a new era."

112. *E.g.*, *Wallace v. Jaffree*, 472 U.S. 38 (1985) (school prayer); *Tennessee v. Garner*, 471 U.S. 1 (1985) (fleeing felon, shoot-to-kill rule); *Ake v. Oklahoma*, 470 U.S. 68 (1985) (right of indigent defendant to court-appointed psychiatrist); *Garcia v. San Antonio Metropolitan Transit Auth.*, 105 S. Ct. 2041 (1985) (tenth amendment); *Evitts v. Lucy*, 470 U.S. 1065 (1985) (right of indigent defendant to court-appointed counsel on appeal).

113. *E.g.*, Kamen, *High Court Reverses Trend: Individuals Win More Civil Liberties Cases*, Washington Post, May 5, 1985, at A1, col. 2.

The conservative wing came on with a rush, however, during the end-of-term crunch, winning ten of the last twelve divided cases and salvaging their accustomed statistical dominance.¹¹⁴ Brennan, Marshall, and Stevens ended up casting more dissents (113) during the Term than the six more conservative Justices combined (96).¹¹⁵ Conservative dominance was made possible by White's continuing support for the four horsepersons and by Blackmun's shift back into the center of the Court after several years in the left wing.

Overall, the October 1984 Term was perhaps slightly less conservative than the prior two Terms, but it was nevertheless consistent with the pattern of conservative dominance that began in 1982. Although one major study concluded that "the Court moved back toward the moderate center and away from the unremitting conservatism of the previous Term,"¹¹⁶ the voting data and major conservative victories suggest that the conservative dominance of the Burger Court's final years remained unbroken up to the summer of 1985.¹¹⁷

The conservative wing dominated the October 1985 Term, last of the Burger era, as well. The Justices' dissent rates reflect that conservative dominance. Marshall and Brennan cast more dissents (108) than all five conservatives combined (105). The dissent rates of Marshall (37.2%) and Brennan (36.9%) were near their personal single-term records and much higher than those of O'Connor (9.7%), Powell (10.5%), and the other conservatives.

Major conservative victories included decisions holding that the constitutional right of privacy does not protect sodomy between con-

114. Major conservative victories during this series included *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 105 S. Ct. 3439 (1985) (free speech); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 105 S. Ct. 3346 (1985) (antitrust); *Sedima S.P.R.I. v. Imrex Co.*, 105 S. Ct. 3275 (1985) (RICO civil liability); *Walters v. National Ass'n of Radiation Survivors*, 105 S. Ct. 3250 (1985) (procedural due process); *Atascadero State Hosp. v. Scanlon*, 105 S. Ct. 3142 (1985) (eleventh amendment). Neither Brennan nor Marshall joined the majority in any of these cases.

115. The dissent rates of Brennan (32.4%) and Marshall (31.3%) were much higher than those of Burger (12.2%), O'Connor (12.3%), and Rehnquist (18.1%).

116. E. WITT, *A DIFFERENT JUSTICE 2* (1986).

117. Conservative dominance was especially evident in free speech and criminal procedure cases. *E.g.*, *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 105 S. Ct. 2939 (1985) (defamation); *United States v. Albertini*, 105 S. Ct. 2897 (1985) ("speech plus"); *California v. Carney*, 471 U.S. 386 (1985) (motor-home searches); *Wayte v. United States*, 470 U.S. 598 (1985) (prosecutions of vocal draft nonregistrants); *FEC v. NCPAC*, 470 U.S. 480 (1985) (PAC campaign expenditures); *Oregon v. Elstad*, 470 U.S. 1039 (1985) (*Miranda*); *Wainwright v. Witt*, 470 U.S. 1039 (1985) (capital punishment); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (school searches).

sentencing adult homosexuals,¹¹⁸ limiting the availability of federal habeas corpus,¹¹⁹ softening restrictions on the death penalty,¹²⁰ striking down an affirmative action program calling for out-of-order layoffs of public school teachers,¹²¹ and weakening *Miranda* protections.¹²² The liberal wing won a few important split decisions, including two major affirmative action cases,¹²³ a death penalty case,¹²⁴ and an abortion case.¹²⁵ Still, major liberal victories were rare.

The lineup during the Term was five conservatives, two liberals, and two moderates, who were statistically left of the Court's center.

TABLE 13

ALIGNMENT OF JUSTICES—OCTOBER 1985 TERM

LEFT	CENTER	RIGHT
Marshall	← Stevens	Rehnquist
Brennan	← Blackmun	Burger
		White
		Powell
		O'Connor

As usual, Rehnquist was on the far right, disagreeing with Marshall in 80 of 143 cases (55.9%) and with Brennan in 74 of 144 cases (51.4%). In his final term, Burger cemented his position as second most conservative Justice of the Burger era, disagreeing with Marshall, the Court's most liberal member, in 51.7% of the cases. As in every term since 1975, Brennan and Marshall held down the left wing, functioning as a loyal opposition.

The remaining five Justices were scattered between the two ex-

118. *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986). Brennan, Marshall, Blackmun and Stevens dissented.

119. *Smith v. Murray*, 107 S. Ct. 9 (1986); *Murray v. Carrier*, 106 S. Ct. 2678 (1986); *Kuhlmann v. Wilson*, 106 S. Ct. 2616 (1986). Brennan and Marshall dissented in all three cases; Stevens dissented in two cases; Blackmun, dissented in one case.

120. *Darden v. Wainwright*, 106 S. Ct. 2464 (1986). Brennan, Marshall, Blackmun and Stevens dissented.

121. *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 3320 (1986). Brennan, Marshall, Blackmun and Stevens dissented.

122. *Moran v. Burbine*, 106 S. Ct. 1135 (1986). Brennan, Marshall and Stevens dissented.

123. *Local 93 v. City of Cleveland*, 106 S. Ct. 3063 (1986) (Burger, White and Rehnquist dissented); *Local 28 v. EEOC*, 106 S. Ct. 3019 (1986) (Burger, White, Rehnquist and O'Connor dissented).

124. *Ford v. Wainwright*, 106 S. Ct. 2595 (1986). Burger and Rehnquist dissented.

125. *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169 (1986). Burger, White, Rehnquist and O'Connor dissented.

tremes. White was statistically third from the right, with Powell and O'Connor fourth and fifth from the right. O'Connor continued her welcome shift toward the Court's "floating center," although she still disagreed with Marshall (42.6%) and Brennan (43.0%) much more than with Burger (14.5%) and Rehnquist (19.6%).

The division between the Court's right and left wings ran between O'Connor and Stevens. Stevens, fourth from the left, followed a typically erratic, somewhat left-of-center course. Blackmun, formerly Burger's "Minnesota Twin," ended the Burger era third from the left: his disagreement rates with Marshall (20.1%) and Brennan (21.4%) were much lower than with Rehnquist (45.1%) and Burger (37.0%).

The Court was unusually divided during the Term. Dissent rates shot up on both wings, reaching one of the highest levels in the Court's history. The following table shows (1) the astonishing polarization and (2) the conservative dominance in the last 20 cases of the Burger era.

TABLE 14

DISSENTS—LAST 20 CASES OF OCT. 1985 TERM

	BR	MA	BL	ST	OC	PO	WH	BU	RE
Bowers v. Hardwick	X	X	X	X					
Japan Whaling v. Am.	X	X	X						X
Papasan v. Allain	←X	←X	←X	←X		X→		X→	X→
Lib. of Cong. v. Shaw	X	X		X					
Posadas v. Tourism Co.	X	X	X	X					
Allen v. Illinois	X	X	X	X					
Bazemore v. Friday	X	X	X	X					
Local 28 v. EEOC					X		X	X	X
Local 93 v. Cleveland							X	X	X
Pa. v. Delaware Valley	X	X	X						
Rose v. Clark	X	X	X						
U.S. v. James	X			X	X				
Baker v. GM	X	X	X						
Randall v. Loftsgaarden		X							
Bethel Sch. D. v. Fraser	X			X					
Arcara v. Cloud Books	X	X	X						
Bowsher v. Synar			X				X		
U. of Tenn. v. Elliott		X	X	X					
Merrell Dow v. Thompson	X	X	X				X		
CFTC v. Schor	X	X							
TOTAL	15	15	13	9	2	1	4	3	4

In short, the Burger era ended with the Court sharply divided and the liberals taking heavy losses.

III. CONCLUSION

The Burger era (1969-86) was, in general, a period of conservative dominance on the United States Supreme Court. From 1969 to 1972, the Court swung sharply away from the liberal activism characteristic of the late Warren Court. By January 1972, the Four Nixonians — Burger, Blackmun, Powell, and Rehnquist — had all been seated, and they dominated the 1972-77 Court, carrying out a far-reaching counterattack on Warren-brand liberal activism. Harry Blackmun's shift out of the conservative bloc in the years after 1976 made possible an abatement in the conservative trend and caused control to pass to the Court's "floating center" from 1977 to 1982. However, the arrival of Sandra Day O'Connor in 1981 and Byron White's increasing conservatism restored the prevailing pattern of conservative dominance on the 1982-86 Court.

The Burger Court's conservatism was reflected in a long series of decisions which strengthened the hand of the police, weakened the enforcement of civil rights and civil liberties, reduced the role of the federal judiciary, increased the legal immunities of state governments, and hastened the retreat from federal programs designed to achieve distributive economic justice. Overall, the Burger Court was more like the restrained, conservative 1949-53 Vinson Court than the liberal-activist 1937-46 Roosevelt Court and 1962-69 Warren Court.

Whether the Burger Court represents a temporary regression from the liberal-activism that characterized most of the 1937-69 period or the start of an enduring conservative period, depends on the longevity of the current Court's less conservative Justices and the outcome of the 1988 election. At present, the trends favor a long period in which Nixon-Reagan conservatism will be the Court's dominant trait.

